STATE OF MICHIGAN

COURT OF APPEALS

In re Application of DETROIT EDISON COMPANY to Increase Rates.

ASSOCIATION OF BUSINESSES ADVOCATING TARIFF EQUITY,

Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION, NATURAL RESOURCES DEFENSE COUNCIL, MICHIGAN ENVIRONMENTAL COUNCIL, and MICHIGAN CABLE TELECOMMUNICATIONS ASSOCIATION,

Appellees,

and

DETROIT EDISON COMPANY,

Petitioner-Appellee.

UNPUBLISHED
July 30, 2013

No. 308130
Public Service Commission
LC Nos. 00-016472
00-016489

MICHIGAN COMMUNITY ACTION AGENCY ASSOCIATION,

Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION, NATURAL RESOURCES DEFENSE COUNCIL, MICHIGAN ENVIRONMENTAL COUNCIL, and UTILITY WORKERS UNION OF AMERICA AFL-CIO LOCAL 223,

Appellees,

No. 308154
Public Service Commission
LC Nos. 00-016472
00-016489

and

DETROIT EDISON COMPANY,

Petitioner-Appellee.

MICHIGAN ENVIRONMENTAL COUNCIL and NATURAL RESOURCES DEFENSE COUNCIL,

Appellants,

v

No. 308156
Public Service Commission
LC Nos. 00-016472
00-016489

MICHIGAN PUBLIC SERVICE COMMISSION,

Appellee,

and

DETROIT EDISON COMPANY,

Petitioner-Appellee.

Before: OWENS, P.J., and GLEICHER and STEPHENS, JJ.

PER CURIAM.

In these consolidated cases, appellant Association of Businesses Advocating Tariff Equity (ABATE) appeals as of right in Docket No. 308130 orders of the Michigan Public Service Commission (PSC) insofar as they called on Detroit Edison to use a revenue decoupling mechanism and authorized the utility to recover more than $79 million in continued funding for a plan to upgrade its meters. In Docket No. 308154, appellant Michigan Community Action Agency Association appeals those orders insofar as they authorized Detroit Edison to continue collecting and paying fees attendant to a contract with the federal government for disposal of spent nuclear fuel despite the federal government's persistent failures to perform under the contract. In Docket No. 308156, appellants Michigan Environmental Council and Natural Resources Defense Council appeal as of right those orders insofar as they authorized Detroit Edison to recover from its ratepayers the costs of operating electricity-producing facilities that those appellants characterize as inefficient and unneeded. We affirm in part, reverse in part, and remand this case to the PSC for further proceedings.

I. STANDARDS OF REVIEW

All rates, fares, charges, classification and joint rates, regulations, practices, and services prescribed by the PSC are presumed, prima facie, to be lawful and reasonable. MCL 462.25. See also *Mich Consol Gas Co v Pub Serv Comm*, 389 Mich 624, 635-636; 209 NW2d 210 (1973). A party aggrieved by an order of the PSC has the burden of proving by clear and convincing evidence that the order is unlawful or unreasonable. MCL 462.26(8). To establish that a PSC order is unlawful, the appellant must show that the PSC failed to follow a statutory requirement or abused its discretion in the exercise of its judgment. *In re MCI Telecom Complaint*, 460 Mich 396, 427; 596 NW2d 164 (1999).

A final order of the PSC must be authorized by law and supported by competent, material, and substantial evidence on the whole record. Const 1963, art 6, § 28; *In re Consumers Energy Co*, 279 Mich App 180, 188; 756 NW2d 253 (2008). Whether the PSC exceeded the scope of its authority is a question of law that is reviewed de novo. *In re Complaint of Pelland Against Ameritech Mich*, 254 Mich App 675, 682; 658 NW2d 849 (2003). A reviewing court should give due deference to the PSC's administrative expertise and not substitute its judgment for that of the PSC. *Attorney General v Pub Serv Comm No 2*, 237 Mich App 82, 88; 602 NW2d 225 (1999).

II. REVENUE DECOUPLING MECHANISM

Appellant ABATE argues that the PSC exceeded its authority in directing Detroit Edison to use a revenue decoupling mechanism (RDM).[1] We agree. In *In re Applications of Detroit Edison Co*, 296 Mich App 101, 110; 817 NW2d 630 (2012), this Court concluded that a plain reading of MCL 460.1089(6) (directing the PSC to authorize certain providers of natural gas "to implement a symmetrical revenue decoupling true-up mechanism that adjusts for sales volumes that are above or below the projected levels that were used to determine the revenue requirement authorized in the natural gas provider's most recent rate case") and MCL 460.1097(4) (directing the PSC to "report on the potential rate impacts on all classes of customers if the electric providers whose rates are regulated by the commission decouple rates"), leaves the PSC without authority "to approve or direct the use of an RDM for electric providers." As the partial concurrence stated, "These sections set forth the scope of the Commission's authority

[1] Such mechanisms are "[a]ttempts to modify regulatory rules, timelines, and methodologies so as to break the link between the electric utility's revenues and the amount of electricity sold," generally involving "guaranteed recovery of fixed costs, regardless of the amount of electricity sold over a given period," and "periodic true-ups wherein utility funds are replenished if less than the expected amount of electricity is sold," or, "[i]f the utility sells more than the expected amount of electricity, excess returns are deposited into an account for later true-ups or redistributed to ratepayers." Quinn & Reed, *Envisioning the smart grid: network architecture, information control, and the public policy balancing act*, 81 U Colo L Rev 833, 857 (2010) (table).

specifically with respect to rate decoupling and clearly limit that authority, regardless of what its scope was before their passage." *Id.* at 119 (SHAPIRO, P.J., dissenting in part and concurring in part). Accordingly, we reverse and remand this case to the PSC for further proceedings relating to the RDM.

III. ADVANCED METERING INFRASTRUCTURE

ABATE argues that the PSC erred in allowing Detroit Edison to recover from its ratepayers nearly $80 million in funding for its advanced metering infrastructure (AMI) program, on the ground that there was insufficient evidence of either the program's costs and benefits, or that the new technology was necessary for the continued provision of electricity to Detroit Edison's customers to justify the expense involved. We agree.

This Court has described the program at issue as

> an information-gathering technology that allows [the utility] to collect real-time energy consumption data from its customers. . . . The so-called "smart meters" allow the utility to remotely monitor and shut-off electricity to customers that have these meters installed. . . . [T]he intention appears to be to allow customers to access real time energy consumption data and make alterations in their energy consumption patterns in order to reduce their own costs and to reduce the demands placed upon the system at times of system peak. [*In re Applications of Detroit Edison*, 296 Mich App at 114 (quotation marks and citations omitted).]

In *In re Applications of Detroit Edison*, this Court reviewed an AMI program under the substantial evidence test and concluded that the funding of the program by ratepayers was not justified by the evidence in the record. *Id.* at 114-116. This Court noted that the program was expensive and commercially untested, exposing ratepayers to significant economic risk, while the evidence to justify the expense consisted mostly of mere "aspirational testimony" concerning expectations for the project. *Id.* at 114-115. This Court further opined, "While we appreciate that a cost-benefit analysis for a pilot program may be more difficult to establish with record evidence, this inherent difficulty does not permit the PSC to authorize millions of dollars in rate increases without an informed assessment supported by competent, material and substantial evidence." *Id.* at 115. This Court remanded the case for a

> full hearing on the AMI program, during which it shall consider, among other relevant matters, evidence related to the benefits, usefulness, and potential burdens of the AMI, specific information gleaned from pilot phases of the program regarding costs, operations, and customer response and impact, an assessment of similar programs initiated here or in other states, risks associated with AMI, and projected effects on rates. [*Id.* at 116.]

This Court further took judicial notice that "on January 12, 2012, the PSC issued an order opening a docket to investigate the use of smart meters by electric utilities in Michigan," which promised to investigate the matter with all due thoroughness. *Id.* at 115 n 3.

The question in this case, then, is whether the evidence of record in this case better justified the AMI funding involved than was the case in *In re Application of Detroit Edison*. We think not.

Detroit Edison relied on the testimony of its AMI Manager, who discussed the background of the program and opined that "[i]ncreased market maturity combined with technological developments have improved the cost effectiveness of AMI and made this deployment a prudent endeavor." The witness further testified that AMI technology would enable "Smart Home" pricing, a scheme intended to "help customers realize the benefits related to dynamic pricing, load control, customer usage presentation and customer outage notification." However, the witness added that the "future breadth and penetration of the Smart Home program depends on the customer acceptance and response during the pilot period," and that, because the program remained in the experimental stages, its costs and benefits beyond the first quarter of 2012 had not been estimated.

The PSC's Manager of the Energy Efficiency Section in the Electric Reliability Division recommended an AMI cost recovery mechanism intended to allocate fairly the risks associated with the AMI between the utility and its customers, but admitted that, among other aspects of the program, "actual smart meter life is unknown at this time."

The PSC noted that Detroit Edison's cost-benefit analysis of full deployment of the AMI throughout its and another utility's service territories indicated a positive net present value of $82.9 million for the two utilities over the life of the project. The PSC then noted that its staff arrived at some different conclusions, including that the requested funding should be reduced by $3.9 million which Detroit Edison requested in contingency funding, on the grounds that it was not well supported, that no such costs may be incurred, or that, if incurred, they could be addressed in a future rate case. After taking into account several other adjustments, the staff envisioned a net present value of negative $52.3 million for the Detroit Edison portion of the AMI. The PSC concluded:

> The Commission agrees . . . that Detroit Edison's benefit/cost analysis, in light of the significant difference between the company's results and the Staff's, is not sufficiently reliable for the Commission to make any determination regarding the [net present value] of the company's proposed investment in AMI.

We conclude that this case is on all fours with *In re Applications of Detroit Edison*, in that what evidence Detroit Edison and the PSC can point to in order to justify imposing AMI costs on the ratepayers may fairly be characterized as "aspirational testimony" concerning expectations for the project. See *In re Applications of Detroit Edison*, 296 Mich App at 115.

Detroit Edison acknowledges this Court's decision in *In re Application of Detroit Edison*, but does not attempt to distinguish that case from this one beyond pointing out that there was a dissent in that case, and also that the instant appeal brings a distinct factual record to bear. Thus, Detroit Edison does not offer any basis for concluding specifically that the evidence available to the PSC in this case went beyond the merely "aspirational" and speculative testimony found wanting in *In re Application of Detroit Edison*. Indeed, Detroit Edison likened the evidence supporting the AMI funding in this case to that presented in the earlier one that led to this

Court's disapproval and remand, thus, seemingly conceding that that result is equally appropriate here, given the binding authority of *In re Application of Detroit Edison*. See MCR 7.215(J)(1).

For these reasons, we follow the example of *In re Applications of Detroit Edison*, and remand this case to the PSC for a full hearing on the AMI program, with instructions to consider "evidence related to the benefits, usefulness, and potential burdens of the AMI, specific information gleaned from pilot phases of the program regarding costs, operations, and customer response and impact, an assessment of similar programs initiated here or in other states, risks associated with AMI, and projected effects on rates." *Id.* at 116.

IV. SPENT NUCLEAR FUEL

Appellant Michigan Community Action Agency Association now joins other public-advocacy organizations in making issue of how a utility has managed the problem of spent nuclear fuel. Not at issue is that, as required by federal law (see 42 USC 10222), Detroit Edison has contracted with the federal Department of Energy for eventual disposal of its spent nuclear fuel; that Detroit Edison has consistently paid on the contract and recovered the attendant cost from its ratepayers; and that the Department of Energy has never performed on the contract—indeed the federal government has abandoned plans for the only site it had ever identified for such storage, Yucca Mountain, and beyond that has closed the agency responsible for continuing to search for an adequate such facility. Also not at issue is that Detroit Edison has had to make its own provisions for storage of spent nuclear fuel while awaiting performance under the contract with the DOE and has recovered the attendant costs from its ratepayers. The Community Action Agency argues that continued payments under the contract are no longer required in light of the federal government's lack of reciprocity in the matter; that Detroit Edison's ratepayers obtain no benefit from the contract and so should not have to cover its costs; and that the PSC should have at least directed Detroit Edison to escrow such contract payments to keep the funds within reach of its ratepayers in the event of final breach and, thus, ultimate shifting of responsibility for SNF disposal to Detroit Edison and its customers.

The PSC has rejected such advocacy in the past, and this Court has affirmed on plenary consideration of the issues. *In re Application of Indiana Mich Power Co*, 275 Mich App 369, 374-380; 738 NW2d 289 (2007). Citing the latter case, this Court more recently disposed of such arguments without elaboration. *In re Application of Detroit Edison Co*, 276 Mich App 216, 240-241; 740 NW2d 685 (2007), aff'd in part and rev'd in part on other grounds 483 Mich 993 (2009). In the latter two cases, the issues were raised by the Michigan Environmental Council and the Public Interest Research Group in Michigan. Here, the Michigan Community Action Agency apparently hopes to revive the issues by suggesting that recent developments in the federal government's failure to perform on the contract constitute a sufficiently new factual situation as to warrant fresh consideration. We are not persuaded.

The failure of the Department of Energy to perform on contracts for nuclear waste disposal has been much highlighted in the various cases preceding this one. That the failure has continued, now accentuated by the abandonment of plans to utilize Yucca Mountain and the dismantling of the agency responsible for managing the matter, does not bring sufficient new factual development to light to warrant departing from precedent.

Nor do we accept the assertion that Detroit Edison's ratepayers receive no benefit from the contract with the DOE. The federal government's current retreat from affirmative plans to develop a national solution to the problem of disposal of spent nuclear fuel does not mean that the federal government will *never* develop and execute such a plan.

Accordingly, Detroit Edison has properly continued to pay on its contract with the DOE despite the latter's nonperformance to date, and the PSC has properly recognized its own duty to defer to federal law. See *Howlett v Rose*, 496 US 356, 367; 110 S Ct 2430; 110 L Ed 2d 332 (1990), quoting *Clafin v Houseman*, 93 US 130, 136-137; 23 L Ed 833 (1876) ("'The laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are. . . . The two together form one system of jurisprudence, which constitutes the law of the land for the State . . . .'").

V. "MARGINAL" GENERATING FACILITIES

Appellants Michigan Environmental Council and Natural Resources Defense Council take issue with the PSC's approval of more than $100 million in funding for capital investments in "marginal" generating facilities, referring to eight relatively old, fossil-fueled electricity-generating plants.

Appellants presented testimony opining that it would be much more economical to put those units into "cold standby," meaning rendered inactive but available should future demand call for reactivation. Detroit Edison's Vice President of Fossil Generation, however, provided extensive testimony on the proposed spending on its facilities, along with a detailed explanation regarding the Midwest Independent Transmission System Operator, Inc. (MISO), tariff. The latter requires a market participant planning to deactivate a power-generating resource to notify the transmission provider, upon which notification MISO would then perform its own analysis to evaluate whether the plant is required for system reliability and advise the market participant of any mitigation measures that may be required to maintain reliability. Detroit Edison's Manager of Wholesale Power testified that "[t]he suggestion that the Company's generation can be removed from MISO without reliability impacts is inconsistent with . . . experience," and recounted a situation whereby MISO indicated that a year-long shutdown of a plant would require $50 million in transmission upgrades.

We conclude that the PSC was justified in deciding the issue in favor of Detroit Edison. Again, we review for substantial evidence, *In re Consumers Energy*, 279 Mich App at 188, and defer to the PSC administrative expertise. *Attorney General*, 237 Mich App at 88.

Appellants argue that the PSC failed to put upon Detroit Edison the burden of proof for its positions that mothballing several plants would engender major expenses in transmission upgrades. We disagree that Detroit Edison bore that burden. A regulated utility has the general duty to show that the costs it recovers from its ratepayers are reasonably and prudently incurred. See MCL 460.6j. However, this duty does not extend to requiring a utility to justify as if in the first instance any continuing aspect of its business operations that an intervenor may challenge. Because the record indicates not that Detroit Edison was endeavoring to do anything new, or otherwise to impose any new burdens on its ratepayers, in connection with its marginal plants, but was instead seeking only reasonable levels of continued support for them, while these

appellants have proposed a substantial change in the relationship between Detroit Edison's facilities and its ratepayers, we hold that it was appellants who bore the burden of proof and persuasion. See *Kar v Hogan*, 399 Mich 529, 539; 251 NW2d 77 (1976) ("The party alleging a fact to be true should suffer the consequences of a failure to prove the truth of that allegation."); *Bunce v Secretary of State*, 239 Mich App 204, 216; 607 NW2d 372 (1999) (a suspended driver petitioning for license reinstatement, being the proponent of a status change, bears the burden of proof of eligibility to resume lawful driving).

Accordingly, Detroit Edison was entitled to rely on experience and informal communications to anticipate that deactivating several of its power plants would engender potentially great expenses in required transmission upgrades, and if appellants wished to rebut that position they were obliged to do so through presentation of competent, material, and substantial evidence.

For these reasons, we conclude that the Michigan Environmental Council and the Natural Resources Defense Council have failed to show that the PSC erred in allowing Detroit Edison to recover from its ratepayers the costs of capital improvements to several of its fossil-fueled electricity-generating plants.

Affirmed in part, reversed in part, and remanded to the PSC for further proceedings. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Elizabeth L. Gleicher
/s/ Cynthia Diane Stephens